

STATE OF CALIFORNIA
BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

**INQUIRY CONCERNING JUDGE
BERNARD J. SCHWARTZ,**

No. 178

**DECISION AND ORDER
IMPOSING PUBLIC CENSURE
PURSUANT TO STIPULATION
(Commission Rule 127)**

I. INTRODUCTION AND SUMMARY

This disciplinary matter concerns Judge Bernard J. Schwartz, a judge of the Riverside County Superior Court since 2003. On February 22, 2006, the commission filed its Notice of Formal Proceedings (Notice) against Judge Schwartz in which it charges him with misconduct as follows.

Count one charges that on the night of July 16, 2005, Judge Schwartz committed the crimes of driving while under the influence of alcohol (DUI) in violation of Vehicle Code section 23152(a), and driving while having 0.08 percent or more, by weight, of alcohol in his blood in violation of section 23152(b) of that code. The first count also charges that following Judge Schwartz's plea of no contest to criminal charges based on the drunk driving, he was convicted in San Luis Obispo County Superior Court on September 6, 2005 of violating Vehicle Code section 23152(b).

Count two charges that before and after Judge Schwartz's arrest related to the DUI on July 16, 2005, the judge repeatedly attempted to avoid being arrested and incarcerated and otherwise to receive preferential treatment because of his status as a judge.

Pursuant to a Stipulation for Discipline by Consent (Stipulation), Judge Schwartz, his counsel Edward P. George, Jr., Esq., and the examiner for the commission, Jack Coyle, Esq. (the parties), propose pursuant to Commission Rule 127(b) that this inquiry be resolved with Judge Schwartz agreeing to the truth of the charges set forth in the Notice, and the imposition of a public censure. The Stipulation was signed by the various parties on April 25, 27 and 28, 2006. According to the terms of the Stipulation, Judge Schwartz also agreed that in the decision and order imposing a censure, the commission “may articulate the reasons for its decision” and that he will “accept any such explanatory language that the commission deems appropriate.” (Stipulation, p. 1.) Pursuant to the Stipulation, Judge Schwartz “waives hearing, review, and any further proceedings.” (*Ibid.*)

In connection with the Stipulation, Judge Schwartz also executed on April 25, 2006, the requisite Affidavit of Consent (Affidavit) under rule 127(d) in which he admitted the truth of the charges, consented to the imposition of a censure, and waived all further proceedings and review by the California Supreme Court.

The proposed agreement, consisting of the Stipulation and Affidavit, was presented to the commission on May 10, 2006, which accepted it that day by a vote of 9 to 0. (Further details concerning the commission vote are set forth at the conclusion of this decision, *post*, at page 8.) This Decision and Order, and the findings and conclusions set forth herein, are based on the Stipulation and Affidavit.

II. STIPULATED FACTS AND LEGAL CONCLUSIONS

Count One

On the night of July 16, 2005, in Pismo Beach, California, Judge Schwartz committed the crimes of driving while under the influence of alcohol in violation of Vehicle Code section 23152(a) and driving while having a 0.08 percent or higher blood alcohol level in violation of Vehicle Code section 23152(b). Judge Schwartz had a blood alcohol level of 0.17 to 0.18 percent, as evidenced by his breath tests. On September 6, 2005, upon a plea of no contest in San Luis Obispo County Superior Court case number M376280, Judge Schwartz was convicted of violating Vehicle Code section 23152(b).

(The charge under Vehicle Code section 23152(a) was dismissed.) He was placed on probation for three years with standard conditions for a first DUI offense.

Judge Schwartz's conduct violated the Code of Judicial Ethics, canons 1 (failing to observe high standards of conduct so that the integrity and independence of the judiciary will be preserved) and 2A (failing to comply with the law and failing to act in a manner that promotes public confidence in the integrity of the judiciary), and constituted prejudicial misconduct. (See *In the Matter Concerning Alvarez* (Dec. 27, 2005) Decision and Order, p. 2 [DUI found to be prejudicial misconduct].)

Count Two

Before and after Judge Schwartz's arrest by the Pismo Beach Police Department for the crimes referenced in count one, he repeatedly attempted to avoid being arrested and incarcerated and otherwise to receive preferential treatment because he was a judge, as follows.

Pismo Beach Police Officer Trimble observed Judge Schwartz's vehicle "swerving all over the road" and pulled him over after he twice violated Vehicle Code section 21460(a) (driving to the left of double parallel solid lines). It appeared to the officer that Judge Schwartz had been drinking. When the officer requested that the judge take a preliminary alcohol screening (PAS) test, the judge responded, "Did you run my license yet?" When the officer said that he had not and again asked the judge to take the PAS test, the judge responded, "Why don't you run my license and then we can talk?" When the officer asked the judge if he was trying to say he was a police officer, Judge Schwartz responded, "No, I'm a judge."

Pismo Beach Police Sergeant Portz arrived on the scene and Judge Schwartz took a PAS test. (From this point on, the conversations were tape recorded.) Officer Trimble informed the judge that the test indicated that his blood alcohol level was 0.15, which was over the legal limit of 0.08 percent. The judge asked if he could just go back to the hotel (where he was staying for the weekend) and leave his car. The officer told the judge "my hands are tied" and there was "nothing I can do."

Officer Trimble then asked Judge Schwartz questions regarding his drinking and driving. The judge claimed to have had only “a couple of glasses of wine,” denied being under the influence of alcohol, and asked, “Is this really necessary, all this stuff we have to go through?” Sergeant Portz responded that they had to do their job “unbiased.”

After Judge Schwartz performed poorly on field sobriety tests, Officer Trimble asked if he would agree to another PAS test. The judge again asserted, “I’m really not under the influence. I’ve had a couple of drinks, but I’m really not under the influence.” Sergeant Portz again told him, “we’re just trying to do our job, unbiased and fairly to everybody.”

When Judge Schwartz took a second PAS test, Officer Trimble informed him that it indicated a higher alcohol level (0.18) than the first test. When the officer told the judge that he was under arrest and asked that he place his hands behind his back, the judge responded, “Can you consider the circumstances of it, and I can just leave my car here, and take me back to the hotel; is that a possibility?” Sergeant Portz again told him, “we have to be fair and unbiased, sir.” The judge responded, “But you know what this is going to do; this will substantially impair my career.” Officer Trimble said, “If I let you go, it could impair my career.” The judge then said, “You don’t have to let me drive; you could just let me go home.” Officer Trimble told him, “I can’t do that.”

Judge Schwartz persisted by asking, “can’t you guys consider the circumstances?” Sergeant Portz responded, “Sir, I’ve already told you that we’ve made our decision. This is the way it’s got to happen.” The judge again asserted, “This really is going to affect my career, I don’t know if you realize that.” When Sergeant Portz suggested that the judge would still have a job, the judge responded, “No, no, I really won’t.” The judge informed the officers that he would have to “self-report” the DUI to the Commission on Judicial Performance.

After being placed in a patrol car, Judge Schwartz said, “You know what? Just leave my car there; just take me back to the hotel and I’ll go to sleep. You can have my keys.” After Sergeant Portz told the judge two more times that they had to be “fair” with everyone, the judge responded, “I know. But, I’m all of a mile away from the hotel....

I know you guys are doing your job, but this is not good for me. I'm running for election next year and this is not a good time."

After Judge Schwartz was taken to the police station, he asked to speak to a "lieutenant or captain." Sergeant Portz told the judge that he would first have to take the breath test (that the judge had chosen to take rather than a blood test) to determine his blood alcohol level. Later, but still before taking the breath test, the judge again asked, "Is there a lieutenant or captain or somebody that I can speak to?" The sergeant again told him that he would first have to take the test.

Judge Schwartz again talked about the Commission on Judicial Performance and being up for reelection and losing his judgeship. Sergeant Portz again told him that they had to be "fair and unbiased." The judge responded, "But, this is a substantial issue with my career. All you have to do is just take me back to the hotel and I'll go to sleep and wake up in the morning and get my car." He again asked the sergeant, "Is there someone I can talk to before I take the test?" The sergeant reiterated that the judge first had to take the test. When the sergeant informed the judge that the result of the breath test was ".17, .18," the judge recognized "that's not good" and again asked to speak to a lieutenant or captain.

After Sergeant Portz informed Judge Schwartz that he would be held in custody until the next morning or until his wife, who was several hours away, could pick him up, he asked the sergeant if the sergeant could telephone the "on-call judge." Despite the sergeant telling Judge Schwartz that he could not "because you are a citizen of the State of California and we're treating you like everybody else," Judge Schwartz persisted in asking him to call a judge that Judge Schwartz could talk to.

Judge Schwartz's efforts to obtain preferential treatment having failed, he told Sergeant Portz and Officer Trimble "there is no professional courtesy here anymore" and "this is bullshit." Judge Schwartz then stated, "You guys come in and appear before me" in court on certain matters. When the sergeant asked the judge why he brought that up, the judge said, "because I'm not being treated fairly." The sergeant responded, "We're

treating you about as fair as we can, same as everybody else. What you are asking for is special treatment.” Judge Schwartz acknowledged, “To some degree, I guess.”

Judge Schwartz’s conduct violated the Code of Judicial Ethics, canons 1, 2A (failing to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary) and 2B(2) (lending prestige of judicial office to advance personal interests); see commentary to canon 2B(2), stating that judge must not use position to gain preferential treatment when stopped by a police officer. Because Judge Schwartz was not acting in a judicial capacity when he attempted to obtain preferential treatment, he committed prejudicial, rather than willful misconduct. (See *Kennick v. Commission on Judicial Performance* (1990) 50 Cal.3d 297, 317-319 (*Kennick*).)

Other Facts Relevant to Discipline

By letter of July 18, 2005, Judge Schwartz promptly reported his arrest to the commission as required by canon 3D(3). Judge Schwartz has no prior discipline.

III. DISCIPLINE

The purpose of judicial discipline “is not punishment, but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system.” (*Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1111-1112 (*Broadman*), citing *Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 912.)

The commission has identified several overlapping factors that are relevant to determining appropriate discipline in furtherance of the disciplinary objectives enunciated in *Broadman*. (Decision and Order Removing Judge Ross from Office, Inq. 174 (2005), p. 64.) As relevant here, the factors include the number and nature of the acts of misconduct; the existence of prior discipline; whether the judge appreciates that he or she committed misconduct; the judge’s general integrity; the likelihood of future misconduct; and the impact of the misconduct on the judicial system. Applying these standards here, we are satisfied that the stipulated censure is the appropriate level of discipline.

The number of acts of misconduct is pertinent to the question of discipline, not according to any rigid formula, *Furey v. Commission on Judicial Performance* (1987)

43 Cal.3d 1297, 1307, but rather, for determining whether the wrongdoing was isolated, or part of a course of conduct establishing “lack of temperament and ability to perform judicial functions in an even-handed manner.” (*Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 918, quoting from *Wenger v. Commission on Judicial Performance* (1981) 29 Cal.3d 615, 653.)

Judge Schwartz admits he committed two instances of prejudicial misconduct. Prejudicial misconduct, committed outside of a judge’s official capacity may be the basis for removal or censure (Cal. Const., art. VI, §18, subd. (d)), but is generally considered less serious than willful misconduct in office. (*Geiler v. Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 284.)

There is no indication of any pattern of behavior similar to that charged in the Notice, or of any broader issue concerning lack of judicial temperament. Nonetheless, Judge Schwartz’s DUI and his resulting criminal conviction are utterly irreconcilable with minimum standards expected of a judge, and as stipulated (see *ante*, p. 3) with the requirements of canons 1 and 2A.

Judge Schwartz’s conduct when he was stopped by the police and in connection with his arrest is particularly offensive. He repeatedly invoked his judicial office in an effort to avoid arrest and otherwise to receive preferential treatment. The judge stipulates (see *ante*, p. 6) that his conduct in this regard is inconsistent with canons 1, 2A, and 2B(2). In the *Kennick* case, the Supreme Court found Judge Kennick’s attempts to invoke the prestige of office as a basis for receiving preferential treatment from the California Highway Patrol the day after his arrest for drunk driving to be “reprehensible.” (*Kennick, supra*, 50 Cal.3d. at p. 340.) The commission views Judge Schwartz’s comparable behavior similarly.

Although Judge Schwartz’s overall conduct here is seriously at odds with the canons and expected judicial behavior, the commission recognizes that all of the wrongdoing arose out of one drunken lapse of judgment to get behind the wheel of his car. However, that lapse is no more excusable here than when anyone else makes a similar mistake while under the influence.

In assessing the likelihood of whether Judge Schwartz will commit future misconduct, the commission has taken into consideration the judge's assurance to the commission that the behavior in question was aberrational; implicit in that assurance is the concept that the judge will not reoffend. The judge has no prior history of any alcohol-related offenses or misconduct, and he has no prior discipline by the commission. The judge promptly self-reported his arrest to the commission. He has acknowledged to the commission the serious nature of, and his expressions of remorse over, his wrongdoing. Finally, Judge Schwartz has stipulated to the imposition of this serious discipline as the appropriate sanction that is commensurate with his admitted serious wrongdoing.

Based on the foregoing analysis and appraisal of Judge Schwartz's wrongdoing, the commission concludes the misconduct here does not rise to the level of wrongdoing in which the Supreme Court has imposed the ultimate sanction of removal from office. The commission also concludes that the purposes of judicial discipline as enunciated in *Broadman* – protection of the public, enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system – can be accomplished through a censure. Accordingly, the commission hereby imposes this public censure of Judge Schwartz.

Commission members Mr. Marshall B. Grossman, Judge Frederick P. Horn, Justice Judith D. McConnell, Ms. Patricia Miller, Mr. Jose C. Miramontes, Mrs. Penny Perez, Judge Risë Jones Pichon, Ms. Barbara Schraeger and Mr. Lawrence Simi voted to accept the parties' settlement proposal and to issue this decision and order imposing a public censure pursuant to the stipulated agreement. Commission members Mr. Michael A. Kahn and Mrs. Crystal Lui did not participate in this matter.

Dated: June 8, 2006

/s/
Marshall B. Grossman
Chairperson